Supreme Court, U.S.
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No. 87-1246

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE STATE OF ARIZONA,

Petitioner,

—v—

STEVEN FELD, LARRY CHABLER,

Respondents.

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Does Arizona's RICO statute, which provides for seizure of profits, proceeds and assets of racketeering enterprises, act as an unconstitutional prior restraint when used to seize nonobscene communicative matter?

2. Can a state, after a conviction based on obscenity as a predicate offense, constitutionally seek forfeiture of assets of the corrupt business which have not been adjudged obscene?

3. Can a state constitutionally order divestiture from racketeering enterprises which have been convicted of the illegal sale of obscene material?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED..... i

TABLE OF AUTHORITIES..... iii

ARGUMENT..... 1

1) The Arizona Supreme Court's denial of a petition for review allows the Arizona Court of Appeals decision to stand as the final judgment with regard to the issues presented in this Petition..... 3

2) Petitioner is not the prevailing party on the provisions ruled unconstitutional, nor did Petitioner ever urge that provisions of the RICO statute be ruled unconstitutional when used in obscenity proceedings..... 4

3) This Court has jurisdiction over a state court's ruling that the federal constitution is violated by a state statute..... 8

CONCLUSION..... 11

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

	PAGE
Cases:	
Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 333, 63 L.Ed.2d 427, 436 (1980).....	7
Fort Wayne Books, Inc. v. Indiana, No 87-470 sub nom. 4447 Corp. v. Goldsmith, 504 N.E.2d 559 (Ind. 1987)...	1, 11
Michigan v. Long, 463 U.S. 1032, 77 L.Ed.2d 1201 (1983).....	8, 9
Terminiello v. Chicago, 337 U.S. 1 (1949).....	9, 10

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Respondents have failed to address the questions presented by this Petition and do not contradict any of Petitioner's arguments. Instead they erroneously attack this Court's ability to decide the questions raised.

This Court has recently granted certiorari in a case presenting identical issues. See Fort Wayne Books, Inc. v. Indiana, No. 87-470 cert.

granted, March 7, 1988, sub nom. 4447 Corp. v. Goldsmith, 504 N.E.2d 559 (Ind. 1987).

Respondents present several arguments as follows: 1) that there was no final judgment and that the Arizona Supreme Court has not yet ruled; 2) that Petitioner is appealing a decision in which it not only was the winning party, but was successful in persuading the court to adopt Petitioner's favored construction of the statute; and 3) that the Supreme Court should not intervene in a state court's construction of a state statute. Petitioner is compelled to reply to Respondents' attempt to shift this Court's focus away from the issues raised in the Petition. Interestingly, they have not contested those issues.

1) The Arizona Supreme Court's denial of a petition for review allows the Arizona Court of Appeals decision to stand as the final judgment with regard to the issues presented in this Petition.

The ruling of the Arizona Court of Appeals declaring unconstitutional the use of certain RICO provisions in conjunction with obscenity proceedings became final when the Arizona Supreme Court declined to review the case, affirming the Court of Appeals. It is irrelevant to this Petition that the trial has not yet begun on the remaining criminal charges, or that more motions will be filed by the defense. There can now be no trial on the RICO/obscenity statute declared unconstitutional by the Arizona appellate courts. The state has been stripped of certain prosecutorial rights and remedies authorized by the statute. These issues have been finally resolved for all courts of the State of Arizona. The case is obviously ripe for

review by this Court and any contention to the contrary is simply disingenuous.

2) Petitioner is not the prevailing party on the provisions ruled unconstitutional, nor did Petitioner ever urge that provisions of the RICO statute be ruled unconstitutional when used in obscenity proceedings.

Respondents would have this Court believe that Petitioner, the State of Arizona, prevailed when portions of the RICO statute were declared unconstitutional. Further, Respondents would have this Court believe Petitioner desired that its statutes be ruled unconstitutional.

These propositions are absurd and Petitioner vigorously denies them. Petitioner's only success was in persuading the Arizona Court of Appeals to preserve at least a part of the challenged statute. Petitioner argued, as here, that the entire statute passed

constitutional muster. Petitioner does not appeal from the ruling upholding a part of the RICO statute; it seeks review of that portion of the ruling invalidating the remainder of the statute.

Petitioner never urged the Arizona Court of Appeals to rule unconstitutional any sections of the RICO statute. On the contrary, it asked the Arizona Court of Appeals to construe the statute in a constitutional manner, which it did, in part. But the Arizona court also ruled that certain provisions were unconstitutional. Specifically, the appellate court held that after a racketeering conviction in an obscenity case, it was unconstitutional to (1) order a criminal to divest of any interest in the corrupt enterprise, (2) restrict the criminal from future activities or investments in the same

enterprise, (3) order dissolution and reorganization of the enterprise, (4) empower courts to order forfeiture of interests or proceeds in the enterprise, to the extent those profits are derived from the sale of material not adjudged obscene, and (5) empower courts to seize property used to facilitate an offense, unless that property is itself contraband or traceable to racketeering proceeds. This invalidation was not urged by the State of Arizona.

A criminal convicted on four counts of first-degree murder but acquitted on one other murder count would not be considered the prevailing party before this Court. Although prevailing on one count, the criminal would still be a convicted murderer and have a right of appeal. Similarly, the fact that RICO in obscenity cases was not entirely struck does not supersede the many

important provisions of the statute ruled unconstitutional.

The cases cited by Respondents stand for the undeniable proposition that "(a) party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it. [citations omitted.]" Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 333, 63 L.Ed.2d 427, 436 (1980). Contrary to Respondents' assertions, however, Petitioner clearly has not received all it has sought. The State of Arizona is aggrieved because its highest appellate courts have erroneously declared its statute unconstitutional on federal constitutional grounds.

3) This Court has jurisdiction over a state court's ruling that the federal constitution is violated by a state statute.

The Arizona Court of Appeals decision purported to rest on state and federal constitutional grounds. However, it did not purport to rest on independent state constitutional grounds. Furthermore, it is clear that the Arizona Court of Appeals was guided by Supreme Court precedent interpreting the federal constitution. The Court did not separately discuss or mention the Arizona constitution's protection of free speech. Under this Court's decision in Michigan v. Long, 463 U.S. 1032, 77 L.Ed.2d 1201 (1983), this Court clearly has jurisdiction to review the state court's decision. Respondents' argue that Michigan v. Long is different because in our case the state court construed the statute as requested by

the state. Petitioner denies that assertion (see Section 2 of this brief, supra) and otherwise fails to see the connection. Our case is analogous to Michigan v. Long.

Respondents also cite the 1949 case of Terminiello v. Chicago, 337 U.S. 1 (1949), for the proposition that a state court's construction of a state statute is "binding [on this Court] as though the precise words had been written into the ordinance." 337 U.S. at 4. Respondents argue that "this Court must look at the statute as if the legislature wrote it as the Court of Appeals construed it. If the prosecutor does not like the statute in that form his remedy is with the State legislature." Respondents' brief at 5.

In this argument, Respondents completely miss the mark. It is not the state court's construction of the

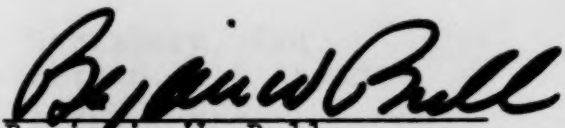
statute that is in question, it is the state court's interpretation of the federal constitution as applied to the statute that is in question. A state court's interpretation of the federal constitution clearly is reviewable by this Court. The issue of this case is not what the law means, but whether the law violates the federal constitution. Thus Terminiello is irrelevant to resolution of this case and does not affect this Court's jurisdiction. Petitioner does not contest that portion of the Arizona Court of Appeals decision which interprets what the statute means or declares a portion of it constitutional. Petitioner only contests the appellate court's understanding of the federal constitution as applied to the RICO statute, and specifically, that it is infirm under the federal constitution.

CONCLUSION

On March 7 this Court granted certiorari in the case of Fort Wayne Books, Inc. v. Indiana, No 87-470. That case involves issues identical to those of the instant case. The petition of Fort Wayne Books, Inc. notes that state courts are divided on these issues and specifically cites the decision of the Arizona Court of Appeals as a contrary ruling on the same issues, attaching the decision in the Appendix. See Petition for Writ of Certiorari to the Supreme Court of Indiana, Fort Wayne Books v. Indiana, No 87-470 at 20, and Appendix G. Petitioner herein respectfully prays

that this Court consolidate these cases in the interest of judicial economy and issue a writ of certiorari to the Arizona Court of Appeals.

Respectfully submitted,



Benjamin W. Bull
Attorney for Petitioner

I hereby certify that on this 18th day of March, 1988, three copies of the foregoing Petitioner's Reply in Support of Petition for Writ of Certiorari were sent by U.S. mail, postage prepaid, to:

Richard J. Hertzberg, Esq.
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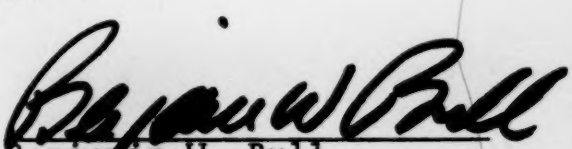
Phoenix, Arizona 85003

All Parties required to be served have been served.



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